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**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

Issued by the Department of Transportation
on the 13th day of February, 1997

Complaint of

NORTHWEST AIRLINES, INC.

against

THE GOVERNMENT OF JAPAN

under 49 U.S.C. section 41310

Docket OST-96-1500

ORDER APPROVING COMPLAINT

Summary

By this Order we approve the complaint of Northwest Airlines, Inc. against the Government of Japan. We have decided to defer a decision on the issue of appropriate sanctions.

Background

On July 3, 1996, Northwest filed a complaint under 49 U.S.C. section 41310 against the Government of Japan (Japan). Northwest states that Japan has refused to authorize its proposed Seattle-Osaka-Jakarta service in violation of the U.S.-Japan Air Transport Agreement.

In support of its complaint, Northwest states that it is one of the carriers designated under the 1952 U.S.-Japan aviation agreement which entitles Northwest to operate without restriction from the United States to Tokyo, Osaka and Naha, Japan and beyond Japan to "points of Northwest's choosing;"¹ that such services include the right to carry fifth-freedom traffic with its schedules subject only to ex post facto review. Northwest further states that, consistent with the provisions of the bilateral aviation agreement, it made the requisite schedule filings in a timely manner with

¹ Complaint of Northwest at 2.

Japanese authorities and Japan accepted the application for consideration and review. Notwithstanding its bilateral entitlements, and its compliance with all Japanese filing procedures, Northwest states that on June 28, 1996, at the conclusion of the second round of intergovernmental discussions on this matter, Northwest was notified that it could not operate the service and that a permit would not be granted. Northwest argues that Japan's action seriously injures Northwest by limiting its ability to serve Asia and by precluding altogether Northwest's participation in the U.S.-Indonesia market; and that Japan's clear violation of the bilateral agreement warrants remedial action under the statute.

In this regard, Northwest requested that the Department immediately require Japan Airlines to cancel its twice weekly service in the Japan-Los Angeles-Brazil market which is operated with local traffic rights between Los Angeles and Sao Paulo, as well as its proposed once weekly flight between Hiroshima and Honolulu whether operated on a scheduled or a charter basis.

By Order 96-7-6, July 5, 1996, we invited all interested parties to file answers and replies to Northwest's complaint. Answers were filed by United Air Lines, Inc., Japan Airlines (JAL), the State of Hawaii, the Port of Seattle, and the Hiroshima Prefecture. Northwest, Hawaii, and JAL filed replies. JAL filed a surreply, United filed a response to JAL's surreply, and JAL filed a reply to United's response²

Summary of Responsive Pleadings

JAL urges the Department to dismiss Northwest's complaint. JAL argues that the real issue in this matter is a difference in interpretation between the United States and Japan of the various U.S.-Japan aviation understandings, and in particular, the effect of the 1989 Memorandum of Understanding (1989 MOU). JAL contends that the Japanese government's position is that the 1989 MOU made "clear that routes not already available to carriers on the basis of existing home country authority granted prior to the signing of the 1989 [MOU] were no longer available as a matter of right."³ JAL further states that it is Japan's position that this clause includes fifth-freedom as well as third- and fourth-freedom services. Since Northwest did not hold U.S. government approval of its Osaka-Jakarta services at the time of the 1989 MOU, JAL contends that Northwest is not entitled to Japanese authorization of its Osaka-Jakarta services, and that Japan's decision not to approve the service does not violate the 1952 Agreement. Although the United States has taken a contrary interpretation of the "non-derogation" provision of the 1989 MOU, JAL contends that such different interpretation does not warrant approval of Northwest's complaint and that the matter should be resolved through intergovernmental discussions.⁴

Northwest argues that, contrary to JAL's assertion, Japan's denial of its Seattle-Osaka-Jakarta service is not based on the "non-derogation" clause of the 1989 MOU, but rather "Japan's publicly announced policy, as of January 1995, to disapprove all 1952 carrier applications to add new routes...regardless [of] whether they are protected or derogated by the 1989 non-derogation

² JAL and United accompanied their filings with motions for leave to file, which we will grant.

³ Answer of JAL at 3.

⁴ The language of the "non-derogation clause" is cited and discussed fully in the Decision section, below.

clause.’⁵ Northwest further argues that the negotiating history of the various understandings between the United States and Japan during the 1980s supports Northwest’s position that the 1952 Agreement entitles it to operate its Seattle-Osaka-Jakarta service with local traffic rights and warrants approval of its complaint.

United agrees with Northwest that Japan has violated the 1952 aviation agreement. In this regard it contends that the purpose of the 1985 and 1989 “non-derogation” clauses was to ensure that the limitations on the MOU carriers were not mistakenly applied to the 1952 carriers, and, thus, to preserve the rights of the 1952 carriers. It further argues that JAL’s insistence that the 1985 and 1989 MOUs limit the rights of the 1952 carriers fails to take into consideration the United States Government’s repeated rejection of that position. United maintains that the United States must stand firm in its well-established and supported position against Japan’s efforts to take away U.S. rights granted in the 1952 Agreement, and to require full and unconditional approval of Northwest’s, as well as United’s, Osaka-Jakarta services.

JAL, in its reply, argues that neither Northwest nor any other party has made a “colorable argument” in support of the proposition that the Japanese government has violated the 1952 Agreement or that Northwest’s complaint warrants action under the statute.⁷ JAL maintains that a difference in interpretation between the United States and Japan cannot lawfully be addressed by means of unilateral sanctions. It, therefore, supports discussions with Japan rather than sanctions. Finally, JAL argues that United’s dispute with Japan over its San Francisco-Osaka-Jakarta service is not relevant to this proceeding and should not be considered by the Department.

Northwest in its reply argues that, notwithstanding JAL’s arguments to the contrary, Japan’s refusal to authorize Northwest’s Seattle-Osaka-Jakarta service violates the U.S.-Japan Aviation Agreement and warrants approval of its complaint.⁸

Northwest’s Motion

On January 23, 1997, Northwest filed a motion for immediate enforcement of its complaint, requesting that the Department approve its complaint by finding Japan in violation of the U.S.-Japan Aviation Agreement and assessing an appropriate sanction. In this regard, Northwest states

⁵ Consolidated Reply of Northwest at 5 and 8.

⁶ United notes that it also has sought to operate beyond Osaka to Jakarta and that the Japanese government has informally indicated that it will approve United’s schedules but only subject to onerous and unlawful restrictions on the amount of fifth-freedom traffic United may carry. United contends that Japan’s actions regarding United’s service are also in violation of the 1952 Agreement and related understandings, and that the Department should find the Government of Japan has violated United’s bilateral rights as well. Answer of United at 2.

⁷ Reply of JAL at 5.

⁸ By Orders 96-8-42, 96-9-40, 96-10-43, and 96-11-27, we extended the deadline for action on Northwest’s complaint for consecutive 30-day periods for the maximum period provided for under the statute in order to provide additional time to reach a negotiated resolution on this matter. By Order 96-12-39, December 27, 1996, we extended the action deadline through January 30, 1997, at the request of Northwest.

that while it initially requested that the Department require JAL to cease its twice-weekly Japan-U.S.-Brazil service and not approve its Hiroshima-Honolulu service, it now believes the appropriate sanction would be denial of JAL's recent application to add new flights between Tokyo and Kona, Hawaii.⁹

United, Seattle, the State of Hawaii, and JAL filed answers to Northwest's motion. United opposes Northwest's motion and states that third- and fourth-freedom rights of either Japanese or U.S. carriers should not be limited due to a dispute over fifth-freedom rights. Seattle supports Northwest's motion and its proposed sanction.¹⁰ JAL opposes Northwest's motion, arguing that its proposed Kona/Atlanta-Tokyo third/fourth freedom services are clearly provided for in the 1985 and 1989 MOUs and that resolution of the issue of Northwest's proposed fifth-freedom services can be achieved only through discussions between the United States and Japan. Hawaii also opposes Northwest's proposed sanctions against JAL's Tokyo-Kona services, arguing that the services are consistent with the U.S.-Japan Aviation Agreement and that denial of these services will adversely affect Hawaii which depends on services in the Hawaii-Japan market.

Decision

After careful consideration of all of the pleadings and issues in this case, we have decided to approve Northwest's complaint. We will defer action, at this time, on the issue of sanctions.

49 U.S.C. section 41310 provides that, upon complaint or on our own initiative, when we determine that a foreign government imposes unjustifiable or unreasonable restrictions on the access of a U.S. air carrier to foreign markets, we may take such action as we deem to be in the public interest. We find that Japan's refusal to authorize Northwest's proposed Seattle-Osaka-Jakarta service constitutes a violation of the provisions of the 1952 Agreement and related understandings, and has denied Northwest route rights to which it is entitled under the 1952 Agreement.

Northwest has been designated to serve Japan on Route B(2) of the 1952 Agreement. That Agreement entitles Northwest to operate scheduled services from many U.S. cities, including Seattle, to Tokyo, Osaka and Naha, Japan, and beyond.¹¹ Thus, Northwest's proposed Seattle-

⁹ Dockets OST-95-842 and OST-95-971.

¹⁰ These parties, as well as the Hiroshima Prefecture, had filed comments addressing the sanctions Northwest had proposed when its complaint was originally filed. As a result of Northwest's January 23, 1997, motion proposing a new sanction, those comments have effectively been superseded.

¹¹ United also filed a supplement to its answer, accompanied by a motion for leave to file, which we will grant.

¹² On February 12, 1997, Northwest filed a copy of a letter from the Governor of Washington to the Secretary, Department of Transportation, supporting Northwest's proposed sanction.

¹³ Indeed, paragraph 1 of an Exchange of Notes between the U.S. Ambassador to Japan, Edwin O. Reichauer, and the Japanese Minister for Foreign Affairs, Etsusaburo Shiina, dated December 28, 1965, provides: "1. Where the word 'beyond' appears in an air route described in the Schedule attached to the Agreement without specification of a subsequent geographical direction, air services on such beyond portion of the route may be operated to any point or points, including points in the home territory."

Osaka-Jakarta services are fully consistent with these provisions of the Agreement, and schedules for these services were properly filed with Japan. The Japanese government's refusal to approve Northwest's Seattle-Osaka-Jakarta services, over the objections of the United States, has denied Northwest rights to which it is entitled under the 1952 Agreement.¹⁴ We have consistently viewed denial of U.S. carrier rights to operate services provided for in our aviation agreements as a most serious violation of this country's bilateral rights.

We are unpersuaded by JAL's arguments that Japan's refusal to authorize Northwest's services is consistent with U.S.-Japan aviation understandings. To the contrary, we find nothing in the 1985 or 1989 MOUs to support a conclusion that those understandings limit Northwest's fifth-freedom services. The premise of JAL's argument is that the non-derogation clauses in the 1985 and 1989 MOUs limit the beyond rights of incumbent carriers to beyond services included in their licenses as of 1985, and since Northwest was not authorized to serve beyond Osaka to Jakarta as of that date, Japan is not required to authorize Northwest's proposed service. This interpretation has consistently been rejected by the United States Government as unsupported by the negotiating history of the 1985 and 1989 MOUs. The subject of those documents was authorization of new U.S.-Japan third- and fourth-freedom services by incumbent or newly designated airlines. Additional language, the often referred to "non-derogation" clause, was added to the MOUs to ensure that there would be no misunderstanding that incumbent carriers designated under the 1952 agreement could continue to exercise any third- and fourth-freedom rights contained in their outstanding U.S. carrier licenses as of the date of the 1985 MOU. That clause specifically states in part:

"The opportunities granted by this memorandum will not derogate in any way from the rights available under the authorizations granted by the designating sides as of April 1, 1985 to the designated airlines currently operating under the U.S.-Japan Civil Air Transport Agreement of 1952, as amended."¹⁶

As it is clear that the "opportunities granted by this memorandum" encompassed third- and fourth-freedom services only, it is also clear that the non-derogation clause similarly contemplated third- and fourth-freedom services by incumbent carriers. Furthermore, since the MOUs included no provision for beyond services, there was no need for specific preservation of those rights in the 1985 and 1989 MOUs. Rather, U.S. carrier fifth-freedom rights continue to be governed by the provisions of the 1952 Agreement and were specifically preserved by the 1965 Exchange of

¹⁴ The United States protested the refusal of Japan to authorize Northwest's service during bilateral discussions held June 3-4, and June 27-28, 1996.

¹⁵ See Complaint of United Air Lines, Inc., against the Government of Japan, Docket 48457, Order 93-2-9, and Complaint of Federal Express Corporation against the Government of Japan, Docket 49094, Order 93-10-36.

¹⁶ The implication of a restriction on the unlimited 1952 operations by the incumbents from "any point in the United States" to the three Japanese points named in the 1952 Agreement route schedules arose from the grant under the 1985 and 1989 MOUs of what otherwise would have been considered existing third- and fourth freedom rights for incumbent and new carriers under the 1952 Agreement's multiple designation provisions.

Notes. In these circumstances, there is no basis to conclude that the MOUs provided any restriction on the beyond services of the 1952 incumbent carriers. Indeed, JAL's argument necessarily assumes that the beyond rights guaranteed incumbent carriers under the 1952 Agreement and preserved by the 1965 Exchange of Notes could in some way be restricted by MOUs that included no provisions for beyond rights, but rather contemplated the operation of third- and fourth-freedom services only. Given the negotiating history of these documents, we find no merit to JAL's argument.

Against this background, it is clear that Northwest is entitled under the terms of the 1952 Agreement to operate its proposed fifth-freedom services beyond Japan. The failure of the Japanese government to authorize Northwest's Seattle-Osaka-Jakarta services, therefore, denies Northwest rights to which it is entitled under the 1952 Agreement and warrants approval under 49 U.S.C. section 41310.

While Northwest now urges immediate restrictions on JAL's Tokyo-Kona services, we have decided to defer a decision on appropriate sanctions at this time. The issue of U.S. carrier fifth-freedom services has been the subject of numerous informal and formal discussions with the Japanese government for some time. Further discussions between the United States and Japan are scheduled for early March. Those discussions will specifically address the issue of U.S.-carrier fifth-freedom rights, including Northwest's Seattle-Osaka-Jakarta services.¹⁷ While we view the Japanese government's actions very seriously, given the imminence of the March discussions, we believe that the public interest is best served if we defer action on the issue of sanctions while this process continues.

ACCORDINGLY,

1. We approve the complaint filed by Northwest Airlines, Inc., in Docket OST-96-1500;
2. We find that the complaint filed by Northwest Airlines, Inc., against the Government of Japan, in Docket OST-96-1500, establishes an unjustifiable and unreasonable restriction against the market access of Northwest Airlines, Inc., with respect to its beyond-Japan services provided for under the U.S.-Japan Air Services Agreement, and warrants approval under 49 U.S.C. section 41310;
3. We defer action on the issue of imposing sanctions in this proceeding until further order of the Department;
4. We grant the motions for leave to file of Japan Airlines Company, Ltd., and United Air Lines, Inc.; and

¹⁷ United has suggested that we make findings with respect to Japan's actions on United's proposed San Francisco-Osaka-Jakarta service. We do not regard it as appropriate to adopt United's suggestion in the context of this order addressing Northwest's complaint. However, we can state that we are well aware of United's concerns with respect to its San Francisco services, have raised this matter with the Japanese and would fully expect to do so in the future.

5. We will serve this order on Northwest Airlines, Inc.; American Airlines, Inc.; Continental Micronesia, Inc.; Delta Air Lines, Inc.; Federal Express Corporation; Trans World Airlines; United Air Lines, Inc.; United Parcel Service, Inc.; Japan Air Lines Company, Ltd.; All Nippon Airways Co., Ltd.; Japan Air System Company, Ltd.; Japan Air Charter Co., Ltd.; Japan Asia Airways Co., Ltd.; Japan Universal System Transport Co., Ltd.; Nippon Cargo Airlines Company, Ltd.; World Air Network Co., Ltd.; the Hiroshima Prefecture; the Port of Seattle, the State of Hawaii; the United States Department of State (Office of Aviation Negotiations); the Assistant U.S. Trade Representative (Asia), the Office of the United States Trade Representative; the United States Department of Commerce (Office of Service Industries); the Ambassador of Japan in Washington, D.C.; and the Air Transport Association.

By:

CHARLES A. HUNNICUTT
Assistant Secretary for Aviation
and International Affairs

(SEAL)